

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

JOHN MORALES, ¹	:	APPEAL NO. C-090797
	:	TRIAL NO. SP-0900050
Petitioner-Appellant,	:	
	:	<i>JUDGMENT ENTRY.</i>
vs.	:	
STATE OF OHIO,	:	
	:	
Respondent-Appellee.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.²

In Wisconsin in 1995, petitioner-appellant Johnny Morales pleaded guilty to and was convicted of first-degree sexual assault of a child under the age of 13. He was sentenced to 15 years' incarceration. The sentence was stayed, and Morales was placed on probation for 15 years. The record does not contain a court order classifying Morales as a sexual offender. There is nothing in the record, other than Morales's testimony that in Wisconsin he was required to annually register by mail for life, to indicate that Morales was registering as a sex offender. When Morales subsequently moved to Ohio, his probation was transferred to this state.

In 2007, the General Assembly enacted Am.Sub.S.B. No. 10 ("Senate Bill 10") to implement the federal Adam Walsh Child Protection and Safety Act of 2006. Although

¹ The notice of appeal lists the petitioner's name as John Morales. Morales's first name appears on all other documents as Johnny.

² See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

it is not clear from the record, apparently at some point the Ohio Attorney General notified Morales that he had been classified under Senate Bill 10 as a Tier III sex offender and that he was required to register with the local sheriff every 90 days for life. Morales filed an R.C. 2950.031(E) petition to contest his classification, challenging the constitutionality of Senate Bill 10. He also filed an R.C. 2950.11(F)(2) motion for immediate relief from the community-notification provisions. After a hearing, the trial court overruled Morales's constitutional challenges to Senate Bill 10. The court granted Morales's R.C. 2950.11(F)(2) motion, exempting him from community notification.

Morales's first assignment of error, which alleges that the retroactive application of Senate Bill 10's tier-classification and registration requirements violates the constitutional ban on ex post facto laws, is overruled.

"The Ex Post Facto Clause applies only to criminal statutes."³ We held in *Sewell v. State*⁴ that the tier-classification and registration provisions of Senate Bill 10 are remedial and not punitive, and that they do not have the effect of converting a remedial statute into a punitive one. Because Senate Bill 10's classification and registration provisions are civil and remedial, not criminal, they do not violate the constitutional ban on ex post facto laws.

Morales's second and fourth assignments of error are overruled because the retroactive application of Senate Bill 10's tier-classification and registration requirements does not violate the prohibition on retroactive laws contained in Section 28, Article II of the Ohio Constitution or the Double Jeopardy Clause of the Ohio

³ See *State v. Cook*, 83 Ohio St.3d 404, 1998-Ohio-291, 700 N.E.2d 570, citing *California Dept. of Corrections v. Morales* (1995), 514 U.S. 499, 504, 115 S.Ct. 1597, and *Collins v. Youngblood* (1990), 497 U.S. 37, 43, 110 S.Ct. 2715.

⁴ 181 Ohio App.3d 280, 2009-Ohio-872, 908 N.E.2d 995.

Constitution.⁵ Morales’s arguments under the United States Constitution are also overruled on *Sewell*’s reasoning.

Morales’s third assignment of error alleges that Senate Bill 10’s requirement that the attorney general classify him violates the separation-of-powers doctrine. We addressed and rejected that argument in *Sewell v. State*,⁶ holding that the retroactive application of Senate Bill 10’s tier-classification and registration requirements did not violate the separation-of-powers doctrine. In *Green v. State*,⁷ we revisited the separation-of-powers issue in light of the Ohio Supreme Court’s decision in *State v. Bodyke*.⁸ The supreme court held in *Bodyke* that “R.C. 2950.031 and 2950.032, which require the attorney general to reclassify sex offenders whose classifications have already been adjudicated by a court and made the subject of a final order, violate the separation-of-powers doctrine by requiring the reopening of final judgments.”⁹ Further, the *Bodyke* court held that the statutes violate the separation-of-powers doctrine because they “impermissibly instruct the executive branch to review past decisions of the judicial branch.”¹⁰ We held in *Green* that the supreme court’s decision in *Bodyke* did not apply to cases in which there is no prior court order classifying the offender under a sex-offender category.¹¹ In cases where there has been no prior judicial adjudication of the offender under a sex-offender category, our holding in *Sewell* is still applicable.¹²

⁵ Id.

⁶ Id.

⁷ *Green v. State*, 1st Dist. No. C-090650, 2010-Ohio-4371.

⁸ ___ Ohio St.3d ___, 2010-Ohio-2424, ___ N.E.2d ___.

⁹ See id. at paragraph three of the syllabus.

¹⁰ See id. at paragraph two of the syllabus.

¹¹ See *Green v. State*, supra, ¶9, at fn. 6.

¹² See id.

Although the record does not contain a prior court order classifying Morales under a sex-offender category, it does not provide a sufficient basis for us to reliably determine whether the *Bodyke* decision applies to him, and whether his classification by the attorney general under Senate Bill 10 violates the separation-of-powers doctrine.¹³ This case must be remanded to the trial court for a determination as to whether Morales was classified under a sex-offender category by a court, and if he was so classified, what his prior classification and registration and notification requirements were under that category. We point out that the burden is on Morales to show any prior judicial adjudication. Finally, the trial court must determine whether the *Bodyke* decision applies to Morales.

Morales's fifth assignment of error is overruled. Morales has no standing to challenge Senate Bill 10's residency restriction because he has not shown that he lives in or owns property within the restricted area or that he has been forced to move outside the restricted area.¹⁴ We note that the Ohio Supreme Court held in *Hyle v. Porter*¹⁵ that because the residency restriction in former R.C. 2950.031 was not expressly made retrospective, it could not be applied to an offender who had bought his home and committed his offense before the effective date of the statute.

Morales's sixth assignment of error, alleging that the retroactive application of Senate Bill 10's registration requirements constitutes cruel and unusual punishment, is

¹³ See *id.* at ¶10.

¹⁴ See *State v. Randlett*, 4th Dist. No. 08CA3046, 2009-Ohio-112, reversed in part and remanded on other grounds, *In re Sexual Offender Reclassification Cases*, ___ Ohio St.3d ___, 2010-Ohio-3753, ___ N.E.2d ___; *State v. Swank*, 11th Dist. No. 2008-L-019, 2008-Ohio-6059; *State v. Duncan*, 3rd Dist. No. 7-08-03, 2008-Ohio-5830.

¹⁵ 117 Ohio St.3d 165, 2008-Ohio-542, 882 N.E.2d 899.

overruled because the statutes are civil and remedial, not punitive.¹⁶ Therefore, the registration requirements cannot be viewed as punishment.¹⁷

Therefore, this case is remanded to the trial court for the reasons set forth under the third assignment of error. The judgment of the trial court is affirmed in all other respects.

Further, a certified copy of this judgment entry shall constitute the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

HILDEBRANDT, P.J., SUNDERMANN and DINKELACKER, JJ.

To the Clerk:

Enter upon the Journal of the Court on October 6, 2010
per order of the Court _____
Presiding Judge

¹⁶ See *Sewell v. State*, supra, at fn. 4.

¹⁷ See id.; *State v. Williams*, 12th Dist. No. CA2008-02-029, 2008-Ohio-6195; *State v. Byers*, 7th Dist. No. 07 CO 39, 2008-Ohio-5051.